Supreme Court, U.S.
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No. 03-312

In The
Supreme Court of the United States

MAHER TERMINALS, INC.,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, And VINCENT RIGGIO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT VINCENT RIGGIO IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Is there jurisdictional status under the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWC") in the case of an employee who, for a given employer, spent 50 percent of his time in covered work, 50 percent of his time in non-covered work and was injured on a day in which he was engaged in non-covered work?

Did the circuit court have subject matter jurisdiction to entertain the petition for review of a non-final order when no petition for review was filed after issuance of a final order?

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RELEVANT STATUTES AND REGULATIONS

Section 902(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. provides:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship builder, and shipbreaker, but such term does not include –
>
> (a) individuals employed exclusively ~~to perform~~ office clerical, secretarial, security or data processing work;

29 C.F.R 18.51 (Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges) states:

STIPULATIONS

> The parties may by stipulation in writing at any stage of the proceedings, or orally made at hearing, agree upon any pertinent facts in the proceeding. It is desirable that the facts be thus agreed upon so far as and whenever practicable. Stipulations may be received in evidence at a hearing or prior thereto, and when received in evidence, shall be binding on the parties thereto.
>
> 29 C.F.R. 18.51

33 U.S.C. Section 921(a) states:

> *Effectiveness and finality of orders.* A compensation order becomes effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order

> are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.
>
> 33 U.S.C. 921(a)

33 U.S.C. 921(c), in relevant part, states:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside.
>
> 33 U.S.C. 921(c)

COUNTER-STATEMENT OF THE CASE

Factual Background:

Mr. Riggio had been employed as a checker since 1978 and was a member of Local 1 of the LIA (clerks and checkers local). He was on Maher's permanent hire list but was not on a specific job list (App.3a). On any given day he could be assigned to work either as a clerk in the office or as a checker (Idem). In the period prior to his injury, Mr. Riggio spent 50 percent of his time working as a checker and 50 percent as a clerk, a fact stipulated to by the Employer (App.3a).

The Petition states that Mr. Riggio on any given day could be "hired" as a clerk or a checker (Petition pg. 5). The term "hired" is misleading because he worked for Maher whenever work was available, he was their steady employee, subject to assignment to differing tasks based

upon the employer's needs. He worked for other employers only when there was no work at Maher (App.17a).

The Petition states:

> Mr. Riggio was 'casual' day laborer provided to Maher through the union hiring call. Each day, Maher orders labor from a local union hiring hall (Petition pg. 4).

There is no support in the record either for the contention that he was a casual day laborer or that Maher each day ordered labor from a local union hiring hall. Maher maintains a list of permanent employees, either in general categories or for a specific job (App.3a).

Maher employed Mr. Riggio both as a checker and as a delivery clerk and split his time evenly between the two positions (App.3a) both as a clerk and a checker he handled the paperwork of both in-coming and out-going cargo (App.3a, 17a). As a checker he worked in the lanes or in the field, checking container numbers and the like, generating a document that all was in order (App.17a). As a delivery clerk, however, he handled the relevant paperwork while working exclusively in an office (App.3a, 17a). As a delivery clerk, he received a delivery order and if everything was proper and all charges paid, the clerk generated a document called a TIR which is given to the driver picking up the cargo who will go to the location listed on the document to pick up the container (App. On Appeal 58a).

Mr. Riggio was injured on February, 1994, on a day he was assigned to work by Maher as a delivery clerk (App.2a-3a).

Procedural History:

After formal hearing before Administrative Law Judge (hereinafter "ALJ") Ainsworth H. Brown the claim was denied on the basis of lack of maritime status (App.45-48a). This order was vacated by the Benefits Review Board (hereinafter "the Board") and the case remanded for further consideration utilizing the proper legal standard, in a decision filed May 27, 1997 (App.37-43a). On remand the matter appeared before ALJ Ralph A. Romano and the claim was again denied due to a claimed lack of status in a decision dated June 19, 2000 (App.33-36a).

The Board, in a Decision filed June 28, 2001, explicitly rejected the same day of injury test and found that there was status under the LHWC and remanded the case to the ALJ for consideration of any remaining issues (App.14-32a).

Maher thereupon filed a petition for review to the United States Court of Appeals for the Third Circuit in accordance with 33 U.S.C. 921(c). The Director, Office of Workers' Compensation Programs, United States Department of Labor, made an appearance in a proceeding and filed a motion to dismiss the petition for review on the basis that the Board's order was not a final decision. Thereafter the director withdrew from further participation in the case. During the pendency of the petition for review, the employee submitted to ALJ Romano a stipulation, signed by the parties, providing, in the event of a finding of jurisdiction, for a schedule loss of 4% of the left arm, minus benefits paid under the Workers' Compensation Law of the State of New Jersey and providing for an attorney's fee to the Employee's attorney. In an initial

order Judge Romano approved the stipulation but characterized it as a settlement. Upon motion of the Employer, Judge Romano issued a subsequent order approving the stipulation but not denominating it as a settlement. No petition for review relative to that decision was filed either with the Board or the circuit court. At oral argument before the circuit court on February 24, 2003, the court entertained oral argument both relative to the Director's motion to dismiss the petition (argued by the undersigned in the absence of the Director) and on the merits of the issue of status under the LHWC.

The United States Court of Appeals for the Third Circuit, in a decision filed February 29, 2003, denied the petition for review (App.1-13a) and denied the Director's motion to dismiss the petition (App.5-6a, footnote 3). The court reasoned that since the order was final (because of Judge Romano's Approval of the stipulation) by the time the court considered the petition, that it had jurisdiction to entertain same.

The Employer's petition for writ of certiorari ensued.

ARGUMENT

POINT I

THE EMPLOYEE HAS THE REQUISITE STATUS AND IS COVERED UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

The legal issue presented in this case is whether a worker who, based upon the record and conceded facts in this case, develops 50% of his time to concededly maritime activity and 50% of his time to concededly non-covered

activity has the requisite status under the LHWC, when he is injured while engaged in non-covered activity. Both the Board and the Third Circuit took the view that such an employee is covered and that relying, in part, on this Court's holding in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

The Employer maintains that there is no coverage for such an employee unless on the very day of injury, he is assigned to covered work.

Caputo does not address the precise issue presented in this case but is significant for its interpretation of Congressional intent for uniformity of coverage. Thus:

> Both the test and the history demonstrate a desire to provide continuous coverage throughout their employment to those amphibious workers who, without their 1972 Amendments would be covered for part of their activity. It seems clear, therefore, that when congress said it wanted to cover "longshoreman" it had in mind persons whose employment is such that they spend *at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments would be covered for only part of their activity.*

Northeast Marine Terminal v. Caputo, 432 U.S. at 273 [emphasis supplied]. See also S.Rep. 13; H.R. Rep. 10-11 U.S. Code Cong. and Admin. News, 4708 ("The intent of the Committee is to permit a uniform compensation system to Apply to employees who would otherwise be covered by this Act for part of their activities").

Shortly thereafter, this Court made clear that the term "maritime employment" in 32 U.S.C. 902(3) was an occupational rather than a geographic concept. *P.C.*

Pfeiffer Co. v. Ford, 444 U.S. 69, 80 (1979). In that case, this court stated that the crucial factor in determining LHWC coverage " . . . is the nature of the activity to which the worker *may* be assigned," 444 U.S. at 82 [emphasis supplied]

and

> Our observation that Ford and Bryant were engaged in maritime employment at the time of their injuries does not undermine the holding of *Northeast Marine Terminal Co.* . . . . that a worker is covered if he spends some of his time in indisputably longshoring operations . . .
>
> 444 U.S. at 83 note 18.

In other words, those workers would still be covered even if, at the time of injury, they were not involved in longshoring operations.

In *Chesapeake and Ohio Railway v. Schwalb*, 493 U.S. 40 (1989) this Court held that employees involved in the maintenance of equipment essential to the loading and unloading process were covered by the LHWC. As they were employed by a railway company and presumably spent some portion of their time in non-covered occupations, Justice O'Connor, in a separate concurring opinion, noted that it was not essential to the court's holding that they were engaged in maritime activities at the moment of injury.

In the instant case, it is conceded that the Employee's work as a checker is covered employment, *Northeast Marine Terminal v. Caputo*, cited above. By the same token, his employment as a delivery clerk in the office

(even though bearing a close nexus to longshoring operations) is not covered, *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 (3rd Cir. 1976).

Contrary to the Employer's assertion, the Employee was not hired on a daily basis but was on Maher Terminals' permanent hire list (App.3a).

The circuit courts have consistently held that an employee who regularly performs maritime duties is covered even if injured while performing non-maritime duties. What has been at issue is the quantum of covered activity that is necessary to confer jurisdiction. The Third Circuit had initially adopted a "primary function" test, *Maher Terminals, Inc. v. Farrell*, cited above. However, in the instant case, the Third Circuit has modified its holding in light of this Court's holding in *Caputo* and the holdings of other circuit courts. Even utilization of a "substantial" portion test, has been rejected by circuit courts utilizing this Court's test of "at least some" time involved in longshoring operation, *Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981).

The First Circuit has adopted a test that a covered employment is a "regular portion" of claimant's employment, *Graziano v. General Dynamics Corporation*, 663 F.2d 340 (1st Cir. 1981). In a later case, the First Circuit made clear that the concept of "regularly assigned duties" is not referring to the amount of time involved in covered employment but whether or not it was a regular feature of the employmee's work duties, *Levins v. Benefits Review Board*, 724 F.2d 4 (1st Cir. 1983).

The Fifth Circuit has held that an employee may establish the status based on either his duties on the date

of injury or the maritime nature of his work as a whole, *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843 (5th Cir. 1989).

The Fourth Circuit affirmed coverage in a case in which an employee spent 15% of his time in covered activities, noting the issue was the employee's occupation as a whole and not the particular duties performed at the time of injury, *In Re C.S.S. & Sugar X Transportation, Inc. [Shivers]*, 151 F.3d 164, (4th 1998), cert. denied, 119 S. Ct. 547 (1998).

In *Odem Construction Co., Inc. v. U.S. Department of Labor*, 622 F.2d 110 (5th Cir. 1980) cert. denied, 450 U.S. 966 (1981), the court found jurisdiction based upon the moment of injury test but also noted that jurisdiction could independently have been found because 20% of the employee's work activities were maritime in nature.

It is further to be noted that the circuit courts have held that employment is not covered when it is episodic, momentary or incidental to non-maritime work, *Coleman v. Atlantic Container Services, Inc.*, 904 F.2d 61 (11th Cir. 1990); *Sea-Land Services, Inc. v. Rock*, 953 F.2d 56 (3rd Cir. 1992).

Clearly, a case in which 50% of the claimant's overall employment duties are maritime in nature satisfies any of the tests promulgated by the circuit courts as to the quantum of maritime employment needed to confer coverage.

POINT II

THE THIRD CIRCUIT'S HOLDING IS CONSISTENT WITH THAT OF OTHER CIRCUIT COURTS AND THIS COURT

The Third Circuit, in substance held, that the coverage issue is determined by the overall nature of the claimant's regularly assigned work duties only with Maher Terminals, with whom he enjoyed a permanent employment relationship.

Maher argues that this approach is contrary to this Court's holding in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997) and to the Ninth Circuit holding in *McGray Construction Co. v. Director, OWCP,* 181 F.3d 1008 (9th Cir. 1999). The Third Circuit properly held that these cases were not of relevance to the facts of this case.

There is one common factual element in *McGray* and *Papai*. In both cases the employee was hired out of a union hall to be temporarily employed, in the case of Mr. Papai for one day. The respective courts also addressed a common argument made in both cases: that the issue of coverage should be determined by the nature of the employment duties with all of the different employers for whom the employees had worked in prior periods. In both cases, that argument was rejected. The Ninth Circuit reasoned that a given employer should be able to predict, when he retains an employee on a given day, whether that individual is or is not a maritime employee. This Court has previously arrived at the same conclusion:

> When the inquiry further turns on whether the employee has a substantial connection to an

> identifiable group of vessels, common ownership or control is essential for this purpose.

Harbor Tug & Barge Co. v. Papai, cited above, at 558.

The coverage inquiry as to whether an individual is a seaman under 46 U.S.C. 688(a) (Jones Act) or a longshoreman are analogous, i.e., in some ways different and in some ways the same.

The inquiry as to seaman status is twofold: do the employee's duties contribute to the function of the vessel or the accomplishment of its mission and does the employee have a connection to a vessel or group of vessels that is substantial in terms of duration and nature.

The injury need not occur on the ship nor need the injury arise out of employment with the ship. It is only required that the injury occur while in service to a ship or fleet, *Chandris, Inc. v. Latsis,* 515 U.S. 347 (1995).

The test the coverage under the LHWC differs because an employee status can be determined by work duties at the time of injury, even if the overall employment is not maritime, e.g., bridge building, *Gilliam v. Wiley & Jackson Co.*, 659 F.2d 54 (5th Cir. 1981), cert. denied, 459 U.S. 1170 (1983). On the other hand, if an employee at the time of injury, is not performing maritime work, (as herein), but some portion of his overall work is maritime in nature, then the status requirement is satisfied, *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978); *Levins v. Benefits Review Board*, 724 F.2d 4 (1st Cir. 1984).

However, at one level the test of seaman versus longshoremen manifests exactly the same policies: 1. The overall duties with the employer (or ship or fleet) at the

time of injury are relevant and 2. a strong policy of continuity throughout employment of coverage or non-coverage, *Northeast Marine Terminal, Inc. v. Caputo*, cited above, *Harbor Tug & Barge Co. v. Papai*, cited above.

POINT III

THE EMPLOYEE IS NOT EXCLUDED FROM COVERAGE BY REASON OF 33 U.S.C. 902(3)

Section 2(3) excludes from the term employees, among others:

> Individuals employed *exclusively* to perform office clerical, secretarial, security, or data processing work;

33 U.S.C. 902(3)(A) [emphasis supplied].

Purely clerical workers were intended by Congress to be excluded by reason of the 1972 amendments, H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess. 11 (1972)). Prior to the 1984 amendments the Third Circuit excluded from coverage an employee who worked exclusively as a delivery clerk, *Maher Terminals, Inc. v. Farrell,* 538 F.2d 476 (3rd Cir. 1977).

The intent of Congress, relative to the 1984 amendments respecting office work, appears intended, by its plain reading to exclude from coverage certain workers who may be on a maritime situs and whose work may contribute to maritime purposes but are not exposed to maritme hazards. For example, prior to the 1984 amendments, security guards had been found to be covered under the LHWC, *Holcomb v. Robert W. Kirk & Associates, Inc.* 655 F.2d 589 (5th Cir. 1981), cert. denied, 459 U.S. 1170

(1983); *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672 (2nd Cir. 1981), cert. denied, 454 U.S. 386 (1981).

More significantly, Congress stated with utmost clarity its intent for continuity or non-continuity of coverage. Thus:

> The Committee intends that these exemptions be applied in an "either-or" fashion – that either the worker is not covered because he or she is engaging exclusively on work which would qualify for an exemption; or because that worker is not exclusively and solely engaged in work which qualifies for the exemption. The Committee firmly believes that the situation in which the worker may be covered at one time and not covered at another, depending upon the nature of the work which the worker is performing at the time of injury must be avoided since such a result would be enormously destabilizing and thus would defeat one of the essential purposes of these amendments.

U.S. Code, Congressional and Administrative News, 98th Congress, 2nd Session, 2736-7.

and

> Thus, for example, as a clerical worker employed by the Stevedore performed clerical work both in the office and on the pier; wharfs or the warehouses, the exemption from coverage by this definition should not be applicable to such worker, and that worker should be covered by the Longshore Act *in all phases of employment.*

Id. at 2736 [emphasis supplied].

By its plain terms, Mr. Riggio is not subject to the exemption of 2(3)(a) because he was not employed by Maher exclusively as a delivery clerk in the office but was also employed as a checker in the field. Congress specifically addressed the situation such as his and specifically stated that such employees should be covered in all phases of employment. Again, the flawed underlying premise of Maher's argument is that only his work on the day of injury should be considered not his overall employment duties with Maher.

Congress stated that one of the purposes of the 1984 amendments was to address "present actuarial and underwriting uncertainties" 1984 USCCAN, 98th Congress, 2736. Congress is expressing a concern that an employer should be able to predict whether a given employee is subject to coverage by a state workers' compensation policy or the far more expensive coverage under the LHWC. In other words, the employer should pay a premium on a given employee's salary either for state or longshore coverage. However, this goal could not be accomplished were the employee to walk in and out of coverage on a daily or even a weekly or monthly basis. Congress has stated, with the utmost clarity, its intent that a given employee should be covered under the LHWC in all phases of employment for a given employer or not covered at all.

POINT IV

IT IS QUESTIONABLE IF THE CIRCUIT COURT HAD SUBJECT MATTER JURISDICTION TO ENTERTAIN THE PETITION FOR REVIEW[1]

In the instant case, the Petition for Review was filed after the Benefits Review Board issued an order finding jurisdiction and remanding this case to the Administrative Law Judge to consider remaining issues, no award of benefits having been made.

Thereafter, the Administrative Law Judge approved a substantive stipulation awarding the Employee compensation payments. Maher filed a Petition for Review neither with the Benefits Review Board nor with the Circuit Court relative to that decision. The court below denied a motion to dismiss because a final order had been issued prior to its consideration of the case.

The Employee recognizes the practicality of the approach taken by the Third Circuit but questions if it is permissible.

In the case of an appeal from the District Court pursuant to 28 U.S.C. 1291, the applicable rule, for example, permits an appeal to be filed after the announcement of the decision but prior to the entry of the judgment, Fed. R. App. P. 4(a)(2); *Schroeder v. McDonald,* 55 F.3d 454 (9th Cir. 1995). However, in the instant case, we are dealing with potential appeals at two different appellate levels:

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[1] Respondent Riggio did not raise this issue in a separate Petition for a Writ of Certiorari because he was not aggrieved by the final decision below.

Board and the circuit court. We are also dealing with a different statute, one containing very specific provisions relative to finality and petitions for review, 33 U.S.C. 921.

The statutes Congress enacts relative to the taking of appeals are regarded as matters of subject matter jurisdiction and are subject to a strict interpretation, *Browder v. Director, Dept. of Corrections*, 434 U.S. 257 (1978); *Finley v. U.S.*, 490 U.S. 545 (1989).

Section 921(a) provides that a compensation order becomes final, unless proceedings for the suspension of setting aside of the order are instituted in accordance with subdivision (b) of that section, i.e. a petition to the Benefits Review Board. A "compensation order" may be made only by a deputy commissioner or administrative law judge, 33 U.S.C. 919(c), (d) and shall be filed in the office of the deputy commissioner, 33 U.S.C. 919(e).

In the instant case, the compensation order making an award was never appealed to the Benefits Review Board. Section 921(a) by its plain terms provides that is the only method of preventing such an order from becoming final.

921(c) permits any party affected or agrees by a final order of the Board to obtain review in the court of appeals for the circuit in which the injury occurred.

The order of the Board was not final and not appealable. The employer had no obligation to file a petition for review until a final order was issued. The courts have taken a strict view as to what constitutes a final order for purposes of appeal, *Browder v. Director, Department of Corrections*, 434 U.S. 257 (1979), *Finley v. U.S.* (cited

above), *Eisen v. Carilisle & Jacquelne*, 417 U.S. 905 (1974).

ALJ Romano's function in approving the stipulation submitted by the parties was not merely ministerial or making a final award of damages. The stipulation submitted to the ALJ addresses itself to substantive issues in the case and he could approve the stipulation only if it were supported by evidence submitted by the parties. In fact, Judge Romano initially misconstrued this stipulation and denominated it as a settlement, requiring a request for clarification by Maher.

Judge Romano's second order approving the stipulation was the final order in this case. No proceedings to set it aside were undertaken.

The case of *National Steel & Shipbuilding Co., Inc. v. Director, OWCP*, 703 F.2d 417 (9th Cir. 1983) has been interpreted as permitting a direct appeal to the Circuit Court of an ALJ's decision after remand by the Board. The facts of the case do not support so broad an interpretation. The Board had affirmed the employer's appeal of an award for permanency and remanded the case for consideration of the period of temporary disability. The circuit court dismissed the employer's petition for review as being interlocutory. Thereafter, the ALJ issued an order declining any further benefits and the circuit court entertained the second petition for review. However, it was the first decision awarding permanency that was the subject of the appeal. The employer was not aggrieved by the second decision in its favor. Therefore, the Circuit Court was actually reviewing the first decision of the Board. In the instant case, the Employer did not file a petition for review

after the monetary award was made although it clearly was aggrieved by that award.

If sections 921(b)(3) (appeal to the Board) and 921(c) (appeal to the circuit court) are considered in isolation, an argument could be made for the Third Circuit's position. Even then, the proposition would be questionable because the circuit court has jurisdiction only to entertain the petition for review of a final order when said petition is filed "within 60 days following the issuance of such Board Order", 921(c).

But when 921(a) is considered, the holding of the Third Circuit is highly questionable. A compensation order becomes final unless it is appealed to the Board.

Finally, it should be noted that the Eleventh Circuit disagrees with the Third Circuit herein and does not permit a direct appeal to the court of appeals absent an appeal to the Board of the final decision, *RMK-BRJ v. Brittain,* 832 F.2d 565 (11th Cir. 1987). In that case the Board had reversed an ALJ's decision and remanded the cases for awards. The employer did not appeal the subsequent ALJ decision to the Board but sought review directly in the circuit court, arguing that the original ALJ decision was correct. The court held it had jurisdiction only to entertain a final decision of the Board.

The LHWC simply does not permit the filing of a petition for review to the circuit court prior to the issuance of a final order of the tribunal below, unlike the Federal Rules of Appellate Procedure.

CONCLUSION

It is respectfully submitted that the Petition herein relative to maritime status under 33 U.S.C. 902(3) should be denied. The intervention of this Court may be required relative to the issue of subject matter jurisdiction pursuant to 33 U.S.C. 921(c). In the event of a denial of the Petition or other final disposition favorable to the Employee, it is requested that attorney's fees and expenditures be assessed against the Employer pursuant to 33 U.S.C. 928(a) and (c).

Respectfully submitted,

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